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NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AE05

Federal Credit Union Ownership of Fixed Assets

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule.

SUMMARY: The NCUA Board (Board) is amending its regulation governing federal credit union (FCU) ownership of fixed assets to help FCUs better understand and comply with its requirements. The final rule does not make any substantive changes to those regulatory requirements. Rather, the amendments only clarify the regulation by improving its organization, structure, and ease of use.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background and Proposal

II. Final Rule

III. Regulatory Procedures

I. Background and Proposal

A. Background.

The Federal Credit Union Act (FCU Act) authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations.¹ NCUA's fixed assets rule interprets and implements this provision of the FCU Act.² In general, an FCU may only invest in property it intends to use to transact credit union business or in property that supports its internal operations or serves its members.³ NCUA's fixed assets rule: (1) limits FCU investments in fixed assets;

¹ 12 U.S.C. 1757(4).

² 12 CFR 701.36.

³ 12 CFR 721.3(d).

(2) establishes occupancy, planning, and disposal requirements for acquired and abandoned premises; and (3) prohibits certain transactions.⁴

For purposes of the rule, fixed assets are premises, furniture, fixtures, and equipment, including any office, branch office, suboffice, service center, parking lot, facility, real estate where an FCU transacts or will transact business, office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.⁵

B. March 2013 proposal.

Executive Order 13579 provides that independent agencies, including NCUA, should consider if they can modify, streamline, expand, or repeal existing regulations to make their programs more effective and less burdensome. Additionally, the Board has a policy of continually reviewing NCUA's regulations to "update, clarify and simplify existing regulations and eliminate redundant and unnecessary provisions."⁶ To carry out this policy, NCUA identifies one-third of its existing regulations for review each year and provides notice of this review so the public may comment. In 2012, NCUA reviewed its fixed assets rule as part of this process.

In March 2013, the Board proposed amendments to the fixed assets rule to make it easier for FCUs to understand.⁷ NCUA has continually received questions about the fixed assets rule, indicating there is some confusion about its application. For example, FCUs have asked for

⁴ 12 CFR 701.36.

⁵ 12 CFR 701.36(c).

⁶ NCUA Interpretive Ruling and Policy Statement (IRPS) 87-2, as amended by IRPS 03-2, Developing and Reviewing Government Regulations.

⁷ 78 FR 17136 (Mar. 20, 2013).

clarification regarding the waiver process, and the provision that requires an FCU to partially occupy unimproved property acquired for future expansion. Accordingly, the Board proposed amendments to the fixed assets rule to clarify the waiver and partial occupation requirements and to improve the rule overall. The proposed amendments did not make any substantive changes to the regulatory requirements. Rather, they only clarified the rule and improved its overall organization, structure, and readability.

II. Final Rule

A. Summary of the public comments on the March 2013 proposal.

NCUA received 9 comments on the proposed rule: 2 from credit union trade associations, 6 from state credit union leagues, and 1 from an FCU. All of the commenters supported the proposal and indicated the amendments make the fixed assets rule easier to understand. Specifically, commenters noted that the plain language revisions and structural reorganization improve the readability of the rule and the newly added definitions enhance clarity and flexibility. Commenters also expressed support for the revised waiver provisions, noting the revisions improve consistency within the regulation and allow FCUs to better understand the waiver process. Several commenters, however, offered suggestions for substantive changes to the regulatory requirements in the current rule.

For example, a number of commenters urged the Board to consider increasing or eliminating the current 5 percent aggregate limit on fixed assets. One commenter asserted that computers,

automated terminals, and other equipment should no longer be treated as fixed assets subject to the 5 percent cap. Several commenters suggested the current requirement to fully occupy premises acquired for future expansion should be eliminated from the rule. Also, one commenter asked that the Board revise and extend the time frames for partially occupying improved premises and unimproved premises acquired for future expansion, which under the current rule are three years and six years, respectively.

These comments are beyond the scope and intent of the March 2013 proposal, which only reorganized and clarified the current regulatory requirements for FCU ownership of fixed assets but did not substantively change them. The Board, however, may take these comments into consideration if it considers making substantive changes to NCUA's fixed assets rule in the future.

The March 2013 proposal did not propose changes to the current process for obtaining fixed assets waivers, but it requested public comment on ways to make the agency's overall waiver process more consistent and user friendly. Several commenters suggested NCUA's current waiver process is overly subjective and provides too much discretion to Regional Directors. Commenters also suggested that minimum criteria for evaluating waiver requests should be outlined in the rule text or in guidance. One commenter suggested that all waiver requests should be deemed approved if the Regional Director does not provide a response within a certain timeframe. Another commenter, however, stated that NCUA should respond to every waiver request and suggested that the automatic approval provision in the current rule should be

eliminated.⁸ Several commenters suggested that the rule should be modified to make available blanket waivers or expedited waivers. Finally, a number of commenters urged the Board to add a framework for waiver appeals.

The Board appreciates this feedback on waivers, especially as NCUA continues to consider ways to improve and clarify its overall waiver process. The Board notes that NCUA's National Supervision Policy Manual (NSPM) includes a chapter on waivers to enhance consistency in waiver processing. The NSPM contains standardized templates for response letters for fixed assets waiver requests and provides guidance on the information that would typically be addressed in the response, including specific reasons for denying a waiver.⁹ NCUA will continue to take steps to improve the waiver process. FCUs are encouraged to contact their examiners and Regional Offices for guidance and assistance prior to submitting a fixed assets waiver application. Regional Directors will make a determination on complete waiver applications as expeditiously as possible. Based on safety and soundness considerations, however, Regional Offices may ask FCUs to submit additional information beyond that described in the rule text. Regional Directors will inform FCUs, in writing, of any additional documentation needed to complete their waiver applications. The Board clarifies that for FCUs with \$10 billion or more in assets, the term "Regional Office" means the Office of National Examinations and Supervision (ONES) and the term "Regional Director" means the Director of ONES.¹⁰

⁸ 12 CFR §701.36(a)(2)(iv).

⁹ See, e.g., NSPM, Appendix 6-A – 6F.

¹⁰ 12 CFR §700.2.

Additionally, the Board emphasizes that any waiver of the 5 percent aggregate limit on fixed assets is considered a one-time event. An FCU with an approved waiver will be required to submit a new waiver request and supporting documentation for any future investment in fixed assets which exceeds an additional one percent of its shares and retained earnings over the amount approved. As a point of clarification, multiple purchases of fixed assets can be made within this one percent. Moreover, NCUA's granting of a waiver does not permit the FCU to operate indefinitely under an approved higher fixed asset threshold. The waiver will cease once the FCU's investments in fixed assets falls below the regulatory 5 percent limit.

B. Summary of the final rule.

The Board is adopting the March 2013 proposed rule as final without change except for one minor modification. In short, the final rule: (1) amends the regulatory text using logical organization, shorter sentences, active voice, and plain, everyday words; (2) adds an introductory section to define the scope of the regulation; (3) reorganizes the existing definitions to the beginning of the rule; (4) clarifies the meaning of "unimproved land or unimproved real property" and "partially occupy" by adding definitions of these terms to the regulation; and (5) clarifies the processes for obtaining waivers.

As noted, the final rule makes one minor modification from the proposed. One commenter suggested that the proposed definition of "unimproved land or unimproved real property" should be simplified in the final rule. Under the proposal, that term was defined as: (1) raw land or land without development, significant buildings, structures, or site preparation; (2) land that has never

had improvements; (3) land that was improved at one time but has functionally reverted to its unimproved state; or (4) land that has been improved, but the improvements serve no purpose for the federal credit union's planned use of the property and are of little value relative to the project.¹¹ This commenter suggested that the clause “and are of little value relative to the project” should be removed because the language is redundant and ambiguous. The Board agrees this clause is superfluous and that its removal does not change the substantive meaning of the definition. The final rule is modified accordingly. The Board emphasizes, however, that NCUA will consider improved land as unimproved for purposes of the fixed assets rule if the improvements, even if functionally and intrinsically valuable, serve no purpose for the FCU's planned use of the property.¹²

The Board reiterates that while the definitions of the terms “unimproved land or unimproved real property” and “partially occupy” are not expressly defined in the current rule, the new definitions reflect NCUA's current interpretation of them. The addition of these definitions clarifies the partial occupancy provisions, but does not impose any new regulatory requirements.

III. Regulatory Procedures

A. Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those

¹¹ 78 FR 17136, 17139 (Mar. 20, 2013) (Emphasis added).

¹² Id. at 17137.

under fifty million dollars in assets). This final rule improves the fixed assets regulation to help FCUs understand its requirements. The final rule does not make any substantive changes to the regulatory requirements. Rather, the changes are intended to improve the rule's organization, structure, and ease of use. NCUA has determined and certifies that this final rule will not have a significant economic impact on a substantial number of small credit unions.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.¹³ For purposes of the PRA, a paperwork burden may take the form of either a reporting or a recordkeeping requirement, both referred to as information collections. As noted above, the final rule makes the regulation easier to understand, but does not impose new paperwork burdens.

C. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. Because the fixed assets regulation applies only to FCUs, this rule does not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various

¹³ 44 U.S.C. 3507(d); 5 CFR part 1320.

levels of government. As such, NCUA has determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

D. Assessment of Federal Regulations and Policies on Families

NCUA has determined that this final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.¹⁴

E. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996¹⁵ (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act.¹⁶ NCUA does not believe this final rule is a “major rule” within the meaning of the relevant sections of SBREFA because it merely makes the regulation easier to understand. NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

List of Subjects in 12 CFR Part 701

Credit unions, Reporting and recordkeeping requirements.

¹⁴ Pub. L. 105–277, 112 Stat. 2681 (1998).

¹⁵ Pub. L. 104–121, 110 Stat. 857 (1996).

¹⁶ 5 U.S.C. 551.

By the National Credit Union Administration Board, on September 12, 2013.

Gerard Poliquin

Secretary of the Board

For the reasons stated above, the National Credit Union Administration amends 12 CFR part 701 as follows:

PART 701 — ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS

1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; Title V, Pub. L. 109-351, 120 Stat. 1966.

2. Revise §701.36 to read as follows:

§701.36 Federal credit union ownership of fixed assets.

(a) Scope. (1) Section 107(4) of the Federal Credit Union Act (12 U.S.C. 1757(4)) authorizes a federal credit union to purchase, hold, and dispose of property necessary or incidental to its operations. This section interprets and implements that provision and it:

(i) Limits investments in fixed assets;

(ii) Establishes occupancy, planning, and disposal requirements for acquired and abandoned premises; and

(iii) Prohibits certain transactions.

(2) This section applies only to federal credit unions.

(b) Definitions. For purposes of this section:

Abandoned premises means real property previously used to transact credit union business but no longer used for that purpose. It also means real property originally acquired for future credit union expansion but no longer intended for that purpose.

Fixed assets means premises and furniture, fixtures, and equipment.

Furniture, fixtures, and equipment means all office furnishings, office machines, computer hardware and software, automated terminals, and heating and cooling equipment.

Immediate family member means a spouse or other family member living in the same household.

Investments in fixed assets means:

- (1) Any investment in improved or unimproved real property which a federal credit union is using, or intends to use, as premises;
- (2) Any leasehold improvement on premises;
- (3) The aggregate of all capital and operating lease payments on fixed assets, without discounting commitments for future payments to present value; or
- (4) Any investment in furniture, fixtures, and equipment.

Partially occupy means occupation, on a full-time basis, of a portion of the premises that is:

- (1) Consistent with the federal credit union's usage plan for the premises;
- (2) Significant enough that the federal credit union is deriving practical utility from the occupied portion, relative to the scope of the usage plan; and
- (3) Sufficient to show that the federal credit union will fully occupy the premises within a reasonable time.

Premises means any office, branch office, suboffice, service center, parking lot, other facility, or real estate where the federal credit union transacts or will transact business.

Retained earnings means undivided earnings, regular reserve, reserve for contingencies, supplemental reserves, reserve for losses, and other appropriations from undivided earnings as designated by the federal credit union's management or NCUA.

Senior management employee means the federal credit union's chief executive officer, any assistant chief executive officers, and the chief financial officer. For example, these individuals

typically hold the title of President or Treasurer/Manager, Assistant President, Vice President or Assistant Treasurer/Manager, and Comptroller.

Shares means regular shares, share drafts, share certificates, or other savings.

Unimproved land or unimproved real property means:

- (1) Raw land or land without development, significant buildings, structures, or site preparation;
- (2) Land that has never had improvements;
- (3) Land that was improved at one time but has functionally reverted to its unimproved state; or
- (4) Land that has been improved, but the improvements serve no purpose for the federal credit union's planned use of the property.

(c) Limits on investment in fixed assets. If a federal credit union has \$1,000,000 or more in assets, the aggregate of all its investments in fixed assets must not exceed five percent of its shares and retained earnings. NCUA may waive this aggregate limit.

(1) To seek a waiver, a federal credit union must submit a written request to its Regional Office.

The request must:

- (i) Describe the proposed investment;
- (ii) Indicate the approximate aggregate amount of fixed assets the federal credit union would hold after the investment (as a percentage of shares and retained earnings); and
- (iii) Fully explain why the federal credit union needs the waiver.

(2) The Regional Director will inform the federal credit union, in writing, of the date its request was received and of any additional documentation needed.

(3) Within 45 days of the receipt of the federal credit union's waiver request or all necessary documentation, whichever is later, the Regional Director will provide the federal credit union a written response, either approving or disapproving the request. The Regional Director's decision will be based on safety and soundness considerations.

(4) If a waiver is approved, the Regional Director will set an alternative limit on the federal credit union's aggregate investments in fixed assets, either as a dollar limit or as a percentage of its shares and retained earnings. Unless the Regional Director specifies otherwise, the federal credit union's future investments in fixed assets must not exceed an additional one percent of its shares and retained earnings over the amount approved.

(5) If the Regional Director does not respond in writing within the timeframe specified in paragraph (c)(3) of this section, the federal credit union may proceed with its proposed investment. However, the federal credit union's investment in fixed assets, and any such future investments, must not exceed the aggregate limit it requested.

(d) Premises not currently used to transact credit union business. (1) If a federal credit union acquires premises for future expansion and does not fully occupy them within one year, it must have a board resolution in place by the end of that year with definitive plans for full occupation. Premises are fully occupied when the federal credit union (or the federal credit union and a credit

union service organization or a vendor) uses the entire space on a full-time basis. Credit union service organizations and vendors must use the space primarily to support the federal credit union or to serve the federal credit union's members. The federal credit union must make its plans for full occupation available to NCUA upon request.

(2) If a federal credit union acquires premises for future expansion, it must partially occupy them within a reasonable period, but no later than three years after the date of acquisition. If the premises are unimproved land or unimproved real property, however, the three-year partial occupation requirement is extended to six years. NCUA may waive the partial occupation requirements. To seek a waiver, a federal credit union must submit a written request to its Regional Office within 30 months after the property is acquired and fully explain why it needs the waiver. The Regional Director will provide the federal credit union a written response, either approving or disapproving the request. The Regional Director's decision will be based on safety and soundness considerations.

(3) A federal credit union must make diligent efforts to dispose of abandoned premises and any other real property it does not intend to use in transacting business. The federal credit union must seek fair market value for the property, and record its efforts to dispose of abandoned premises. After premises have been abandoned for four years, the federal credit union must publicly advertise the property for sale. The federal credit union must complete the sale within five years of abandonment, unless NCUA waives this requirement. To seek a waiver, a federal credit union must submit a written request to its Regional Office and fully explain why it needs the waiver. The Regional Director will provide the federal credit union a written response, either

approving or disapproving the request. The Regional Director's decision will be based on safety and soundness considerations.

(e) Prohibited transactions. (1) A federal credit union must not acquire, or lease for one year or longer, premises from any of the following, unless NCUA waives this prohibition:

(i) A member of the federal credit union's board of directors, credit committee, supervisory committee, or senior management, or an immediate family member of such individual;

(ii) A corporation in which a member of the federal credit union's board of directors, credit committee, supervisory committee, or senior management, or an immediate family member of such individual, is an officer or director, or has a stock interest of 10 percent or more; or

(iii) A partnership, limited liability company, or other entity in which a member of the federal credit union's board of directors, credit committee, supervisory committee, or senior management, or an immediate family member of such individual, is a general partner, or a limited partner or entity member with an interest of 10 percent or more.

(2) A federal credit union must not lease for one year or longer premises from any of its employees if the employee is directly involved in investments in fixed assets, unless the federal credit union's board of directors determines the employee's involvement is not a conflict of interest.

(3) All transactions with business associates or family members not specifically prohibited by this section must be conducted at arm's length and in the interest of the federal credit union.

(4) To seek a waiver from any of the prohibitions in this paragraph (e), a federal credit union must submit a written request to its Regional Office and fully explain why it needs the waiver. Within 45 days of the receipt of the waiver request or all necessary documentation, whichever is later, the Regional Director will provide the federal credit union a written response, either approving or disapproving its request. The Regional Director's decision will be based on safety and soundness considerations and a determination as to whether a conflict of interest exists.

[FR Doc. 2013-22729 Filed 09/17/2013 at 8:45 am; Publication Date: 09/18/2013]